No. 04-574

IN THE

Supreme Court of the United States

FOREST L. DARBY,

Petitioner,

v.

A-BEST PRODUCTS COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION FOR RESPONDENT VIAD CORP.

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QUESTION PRESENTED

Are state common-law tort claims against manufacturers of locomotive equipment preempted by the Boiler Inspection Act – enacted with congressional intent to occupy the entire field of locomotive regulation – when such claims relate to the design, construction, or material of locomotives or their parts?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Viad Corp. does not have a parent corporation, and there is no publicly held company that owns ten percent or more of its stock.

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STATEMENT OF THE CASE

In general, petitioner's Statement of the Case correctly describes the substance of petitioner's proposed state law claims and the holdings of the trial court, the Ohio Court of Appeals, and the Ohio Supreme Court that the claims are preempted. (Petition for Writ of Certiorari ("Pet.") 1-3, 10-12.)[1]

SUMMARY OF ARGUMENT

There is no issue that warrants this Court's review. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), holds that the Boiler Inspection Act (BIA),[2] now codified at 49 U.S.C. §§ 20701-20903, occupies the field of all matters "within the scope of the authority delegated to the [Interstate Commerce] Commission" – now the Secretary of Transportation – including "the design, the construction, and the material of every part of the locomotive," *i.e.*, the "entire locomotive . . . and all parts and appurtenances thereof." *Id.* at 608, 611, 613. *See also* Petitioner's Appendix ("Pet. App.") 14a-15a. The BIA therefore preempts all state law – including common-law tort claims against locomotive equipment manufacturers – in the field, as it must. Otherwise, railroads would have to change locomotives and their parts

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[1] Petitioner wrongly states that his original complaint alleges claims against "Respondents" (Pet. 1-2). The original complaint alleged no claims against respondents, and the courts below denied leave to add respondents as defendants because the claims petitioner sought to assert against them are preempted.

[2] The BIA is now called the Locomotive Inspection Act (LIA) and is also referred to in some court decisions as the FLIA or LBIA. It is referred to herein as the BIA.

as trains crossed state lines or conform to the rule of the most exacting state, a burden Congress deemed intolerable.

Napier disposes of the case at bar. Petitioner's state law claims attack the locomotive "design" that called for asbestos, the "construction" that used it, and the "materials" themselves, and petitioner does not claim otherwise. They accordingly fall squarely within the Secretary's authority and so, the Ohio Supreme Court properly held, within the preempted field.

That is true whether the state law under which the duty is imposed is common-law or not, and is also true whether the claim is made against the railroad operator or the locomotive manufacturer. It has been settled for over forty years that tort claims are designed to regulate and affect conduct in the same manner as statutes and regulations, and so tort claims are preempted just as statutes and regulations are. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."). Moreover, inasmuch as the BIA speaks to locomotive design, construction, and material, the manufacturers that design and construct locomotives and their parts are necessarily at the center of that field. Thus, as a practical matter, state law imposing duties on manufacturers must be preempted, lest the uniformity required by federal law be destroyed.

The petition therefore presents no issue meriting the exercise of this Court's certiorari jurisdiction. The decision of the Ohio Supreme Court does not conflict with a decision of this Court or of any federal court of appeals or state appellate court of last resort. Four circuit courts – the Ninth,

Eighth, Sixth, and Second Circuits – and three state supreme courts – Alabama, California, and West Virginia – have previously considered the precise question presented here, *see infra* at 8-9, and all reached the identical conclusion: state common-law tort claims against a locomotive manufacturer are preempted by the BIA pursuant to *Napier*. Moreover, the state cases all concerned asbestos. So settled is the preemptive scope of the BIA as to petitioner's claims that this Court has denied certiorari to review the decisions of three of these courts – the Second Circuit in *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458 (2d Cir.), *cert. denied sub nom. Oglesby v. General Motors Corp.*, 528 U.S. 1004 (1999), the Sixth Circuit in *Springston v. Consolidated Rail Corp.*, 130 F.3d 241 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998), and the California Supreme Court in *Scheiding v. General Motors Corp.*, 22 Cal. 4th 471, *cert. denied*, 531 U.S. 958 (2000) – as well as the decision of the Indiana Court of Appeals in *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (Ind. App. 1996), *appeal denied sub nom. Dillon v. Chicago Southshore & South Bend R. Co.*, 683 N.E.2d 591 (Ind.), *cert. denied sub nom. Dillon v. Northern Indiana Commuter Transp. Dist.*, 522 U.S. 914 (1997).

In short, *Napier*'s application here presents no conflict, or important question, or any question truly in dispute at all.

REASONS FOR DENYING THE PETITION

I. Settled Law Preempts Petitioner's Claims

For 78 years, since Justice Brandeis' opinion for the Court in *Napier*, it has been settled that Congress intended the BIA to preclude all state law respecting locomotives and locomotive parts and equipment used in interstate commerce. 272 U.S. 605.

Napier held that Congress intended the BIA "to occupy the field" in respect to all areas subject to the BIA, and that the BIA accordingly preempted all state law within the BIA's grant of authority to the Interstate Commerce Commission – whose successor is the Secretary of Transportation, via the Federal Railroad Administration[3] (FRA). *Id.* at 611, 613. Those areas include "the entire locomotive and tender and all parts and appurtenances thereof," including "the design, the construction, and the material of every part." *Id.* at 608, 611. The Court found that the BIA conferred on the Commission "general" power to regulate locomotive safety equipment and that the BIA's grant to the Commission of that general power preempted all state law falling within the scope of the Commission's authority. *Id.* at 611-13.

The Court further found that the state laws at issue were "within the scope of the authority delegated to the Commission" by the BIA, *id.* at 611, and so were preempted

[3] In 1966 the power originally granted to the ICC was transferred to the Secretary of Transportation. Department of Transportation Act, Pub. L. 89-670, § 6(e)(1), 80 Stat. 931 (1966). *See generally Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983). The FRA, a part of the Transportation Department, exercises this power. 49 C.F.R. § 1.49(c)(5), (g) (2004).

regardless whether they conflicted with a federal rule, or whether there was any applicable federal rule at all:

> **It is also urged that, even if the Commission has power to prescribe** an automatic fire box door and a cab curtain, **it has not done so, and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance.** The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. . . . [R]equirements by the States are precluded, however commendable or however different their purpose.

272 U.S. at 613 (emphasis added). In sum, "[i]f the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it." *Id.*

Congress preempted the field for good reason. Locomotives must cross state lines routinely, so the subject "is peculiarly one that calls for uniform law." *See Pennsylvania R. v. Pub. Service Comm'n*, 250 U.S. 566, 569 (1919) (Holmes, J.) (mail cars).

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances . . . through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern

> themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."
>
> * * *
>
> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress' goal of uniform, federal railroad regulation would be undermined.

Law v. General Motors Corp., 114 F.3d 908, 910-11 (9th Cir. 1997) (citation omitted); *accord Springston*, 130 F.3d at 245; *Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D.N.Y. 1964) (Friendly, J.), *appeal dismissed*, 382 U.S. 111 (1965), *aff'd*, 364 F.2d 241 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967); *Scheiding*, 22 Cal. 4th at 483; Pet. App. 15a.

In addition, Congress gave petitioner – a railroad worker – a potent remedy for his alleged injuries that does not undermine the BIA's goal of uniformity. *Law*, 114 F.3d at 912. It lies against his employer, under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*[4] "This remedy is strong

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[4] Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliance, machinery, track, roadbed, works, boats, wharves, or other equipment.

medicine." *Law*, 114 F.3d at 912. Under it, a worker may recover the same compensatory damages as are available at common law where "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957). FELA demonstrates how Congress intended railroad workers injured on the job would be compensated, and shows why its decision to preempt is sensible.

Petitioner's contention (Pet. 23-24) that preempting tort claims leaves no recourse for passengers and bystanders is not an issue in this case. Petitioner is a former railroad employee, and so eligible to bring a FELA claim against his former employer. The argument also goes nowhere. Federal law occupies the field and alone can impose duties. *See Spinelli v. Gaughan*, 12 F.3d 853, 858 (9th Cir. 1993) ("Once Congress has chosen to preempt the state claim, it's free to give affected individuals a full federal claim, a claim providing only for remedies limited to equity, a damages claim only, *or no claim at all.*") (emphasis added).[5]

[5] Thus in *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205, 1209-10 (9th Cir. 2001), the Ninth Circuit expressly rejected the plaintiff's argument "that *Law* preempts only claims by railroad employees, not persons who have no remedy under the [FELA]." *Forrester* observed that *Marshall, First Security Bank v. Union Pacific R. Co.*, 152 F.3d 877 (8th Cir. 1998), and *Springston* all had previously "held a common-law claim of a motorist against a railroad arising out of a crossing accident, to the extent it was based on the railroad's inadequate warning devices, [to be] preempted by the Act." *Id.* Accordingly, even as against railroads, all common-law claims within the preempted field – including petitioner's parade of horribles, *viz.*, that the "scope of resulting immunity from tort claims will be endless" (Pet. 24) – are barred by the BIA; and only railroad workers

(Cont'd)

II. There is No Conflict in the Appellate Courts

Contrary to petitioner's argument (Pet. 3) that the "Supreme Court of Ohio did not follow this Court's directives concerning proper preemption analysis," the Ohio court got it exactly right, adhering to an unbroken line of authority from federal courts of appeals and state appellate courts of last resort that follow *Napier* without exception and hold that the BIA preempts state common-law and statutory claims against railroad operators and locomotive manufacturers related to the design, construction, or material of locomotives and their parts – the field the BIA occupies. *Forrester*, *supra* (9th Cir.) (BIA preempts non-employee product liability actions against manufacturer of locomotive cranes); *Law*, *supra* (9th Cir.) (quoting *Garmon;* BIA preempts design defect and failure to warn claims against manufacturer concerning engine insulation and brake noise); *Marshall*, *supra* (9th Cir.) (Kennedy, J.) (BIA preempts common-law claims for failure to install warning devices on locomotive); *First Security*, *supra* (8th Cir.) (BIA preempts state common-law remedies against railroad manufacturers for injuries arising out of alleged design defects); *Springston*, *supra* (6th Cir.) (BIA preempts common-law claims against manufacturer);

(Cont'd)

can obtain BIA relief under FELA. There is therefore nothing particularly remarkable about the determination that, because of BIA field preemption, all common-law claims of whatever nature against locomotive manufacturers – which are not subject to FELA – should likewise be barred. In sum, railroad workers have a statutory remedy, but only against their employers, which are 100 percent liable through FELA. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 165-66 (2003). For all others – such as passengers, motorists, and bystanders – BIA field preemption simply precludes all remedies against both railroads and manufacturers.

United Transp. Union v. Foster, 205 F.3d 851 (5th Cir. 2000) (BIA preempts statute requiring engine be equipped with signal devices); *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987) (BIA preempts state requirement for emergency equipment); *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (BIA preempts state statute requiring locomotive speed indicators); *Oglesby*, *supra* (2d Cir.) (BIA preempts employee common-law claims against locomotive seat manufacturer); *General Motors Corp. v. Kilgore*, 853 So. 2d 171 (Ala. 2002) (BIA preempts claims against manufacturer for use of asbestos in locomotive parts); *Norfolk Southern Ry. Co. v. Denson*, 774 So. 2d 549 (Ala. 2000) (BIA preempts state law claim seeking to hold locomotive manufacturer liable for failure to install air conditioning); *Scheiding*, *supra* (Cal.) (BIA preempts railroad workers' tort claims against manufacturer for asbestos-related injuries); *Mickleson v. Montana Rail Link, Inc.*, 999 P.2d 985 (Mont. 2000) (BIA preempts common-law claims against railroad concerning locomotive equipment); *In re West Virginia Asbestos Litigation*, 215 W. Va. 39, 592 S.E.2d 818 (2003) (BIA preempts state tort law claims against manufacturers of locomotives and asbestos-containing parts and components thereof).[6]

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[6] *See also Key v. Norfolk Southern Ry. Co.*, 228 Ga. App. 305 (1997) (BIA preempts common-law claims against railroad by employee injured in fall from locomotive steps); *Central of Georgia R. Co. v. Markert*, 200 Ga. App. 851, *cert. denied*, 200 Ga. App. 895 (1991) (same); *Dillon (In re Train Collision)*, *supra* (Ind. App.) (BIA preempts common-law claims against manufacturer); *Furlough v. Union Pacific. R. Co.*, 766 So. 2d 751 (La. App. 2000), *writ denied*, 781 So. 2d 556 (La. 2001) (BIA regulation of locomotive ditch lights); *Carter v. Consolidated Rail Corp.*, 126 Ohio App. 3d 177, *appeal*

(Cont'd)

Accord Pet. App. 15a (quoting *West Virginia Asbestos Litigation*, 529 S.E.2d at 822, and finding that, through the BIA, Congress "occupied the field of railroad safety so pervasively" that "any other path" was "blocked by an avalanche of adverse authority from other jurisdictions, both state and federal").

III. Common-Law Tort Claims Fall Within the Field Preempted by the BIA

Despite the uniform adverse authority, petitioner argues (Pet. 13-16) that *Napier* is inapplicable because it addresses only statutory claims, not tort claims. However, it has been settled for over four decades that tort claims are intended to affect conduct, regulate just as statutes and regulations do, and are accordingly preempted as statutes and regulations are:

> Our concern is with delimiting areas of conduct which must be free from state regulation if

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denied, 82 Ohio St. 3d 1413 (1998) (BIA preempts common-law claims arising from alleged asbestos exposure); *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993*, 188 F. Supp. 2d 1341 (S.D. Ala. 1999) (BIA preempts passenger and employee common-law negligence and design defect claims against manufacturer); *Roth v. I&M Rail Link, L.L.C.*, 179 F. Supp. 2d 1054 (S.D. Iowa 2001) (BIA preempts state common-law tort claims against manufacturer in action brought by widow of employee crushed in collision); *Eldridge v. Missouri Pacific R. Co.*, 832 F. Supp. 328 (E.D. Okla. 1993) (BIA preempts negligence claim based on inadequate locomotive warning devices); *Seaman v. A.P. Green Ind., Inc.*, 184 Misc. 2d 603 (N.Y. Sup. Ct. 2000) (cited by the Ohio Supreme Court in the case at bar and in *Kilgore* and *West Virginia Asbestos Litigation*; BIA preempts common-law asbestos claims against manufacturer).

> national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Garmon, 359 U.S. at 246-47.

That continues to be true. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (quoting *Garmon*). This Court has repeatedly held that ordinary preemption principles apply to common-law damage actions. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868-69, 872 (2000) (products liability claim preempted; "ordinary pre-emption principles, grounded in longstanding precedent" dating back at least to *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), will continue to be applied in determining whether or not there is "pre-emption of state tort suits"); *Buckman v. Plaintiffs' Legal Committee*, 531 U.S. 341, 352 (2001) (common-law claim for personal injuries preempted; "ordinary" preemption principles applied); *see Cipollone*, 505 U.S. at 521-23 (common-law failure to warn claims alleging personal injury preempted); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987) (common-law nuisance claims preempted); *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344, 358 (2000) (Federal Railway Safety Act "pre-empts respondent's state tort claim"); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) ("there is little reason why state

impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general [damages] statute").

This is as it must be. The prospect of tort damages would compel manufacturers to make, and railroads to buy, locomotives complying with judicially imposed tort duties. Fifty states' – and their juries' – varying notions of railroad "safety" would impose precisely the patchwork of varying state laws, and *ad hoc* regulation by juries, that Congress intended to preclude. *Law*, 114 F.3d at 910-11; *accord Oglesby*, 180 F.2d at 462 (preemption of common law is "necessary to keep the locus of regulation at the federal level and maintain the uniformity that is a goal of the BIA"); *Kilgore*, 853 So. 2d at 176; *Scheiding*, 22 Cal. 4th at 480; *West Virginia Asbestos Litigation*, 592 S.E.2d at 823-24.

Still, petitioner argues (Pet. 15), "Congress could not have possibly ... intended that the BIA would preempt common law claims" against locomotive manufacturers because those claims did not exist in 1911, before the advent of strict liability. This argument misses the point. Congress occupied the field of locomotive parts and equipment. State law is precluded from that occupied field whether the law precedes the occupation or comes after it; Congress' occupation of the field is not an invitation for new state law to intrude on it.[7] Indeed, *Napier* disposes of the argument;

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[7] *See Scheiding*, 22 Cal. 4th at 480:

> But this reasoning proves too much: Equally logically, Congress could not have intended to preserve that which did not exist. Furthermore, the BIA was enacted as an amendment to the [FELA] ..., which significantly

(Cont'd)

the state statutes there were enacted after the BIA, yet this Court found them preempted. *Id.* at 607. But, if Congress could only preserve federal supremacy by re-endorsing field preemption after strict liability was introduced, it did so here. Congress restated in 1970 that the BIA preempts the field, and it recodified the BIA in 1994, expressly preserving existing precedent on the subject such as *Napier* and *Marshall*, 720 F.2d 1149 (BIA preempts tort claims).

In short, *Napier* has been the law for over 75 years, and petitioner cites no case from any appellate court that questions *Napier*'s controlling force over common-law claims against locomotive manufacturers.

IV. The Statutory Scheme: The BIA Applies to Railroad Manufacturers

Petitioner's speculation (Pet. 8-9) that Congress intended to exclude manufacturers from the cloak of preemption for state tort claims – by originally including manufacturers under the BIA but then intentionally deleting them – misunderstands the legislative history of the statute. The 1910 legislative bill would have required manufacturers to indent on each plate of a boiler the manufacturer's name and location, as well as a strength rating; however, Congress dropped the provision after testimony revealed that such

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(Cont'd)

> expanded the ability of railroad workers to seek recourse for on-the-job injuries. . . . Having enlarged the basis for recovery under federal law, Congress reasonably could have intended to restrict it under state law.

(Citations omitted).

indentations were unnecessary and would cause damage.[8] S. 236 § 2, 61st Cong. 2d sess. (1910); *Bills Affecting Interstate Commerce: Hearings Before the Comm'n on Interstate and Foreign Commerce of the House of Representatives*, 61st Cong. Part V at 317 (1910). Significantly, there is no indication that Congress intended to repudiate the federal primacy of the BIA or to subject locomotive manufacturers, but not operators, to state law.

Additionally, that the 1988 amendment added the language "any person" to augment the penalty provision simply has no relevance to the preemptive scope of the BIA as respects manufacturers. In order to effectuate Congress' goal of a nationally uniform standard of regulating locomotive equipment, claims against manufacturers must be preempted, and are preempted, for the same reasons claims against railroads are: "[i]mposing tort liability on railroad equipment manufacturers would ... [force] them to conform to [state standards, thereby] ... transfer[ring] the regulatory locus from the secretary of transportation to the state courts – a result the BIA was clearly intended to foreclose." *Law*, 114 F.3d at 911-12. *See also* Pet. App. 16a, quoting *Law*. Thus, it is *what*, not *who*, is regulated that is determinative. *See Taylor AG Ind. v. Pure-Gro*, 54 F.3d 555, 562 (9th Cir. 1995). The BIA's field preemption covers the "design, the

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[8] In addition, the 1910 bill was a precursor to the original BIA, which did not occupy the field. *Napier*, 272 U.S. at 611. Amendments by different Congresses years later – in 1915 and 1924 – did occupy the field. *Id.* An off-point decision by Congress in 1910 is irrelevant to the intent of later Congresses that decided to occupy the field. *Cf. Russello v. United States*, 464 U.S. 16, 26 (1983) (rejecting "views of a subsequent Congress" as "basis for inferring the intent of an earlier one") (citations omitted).

construction, and the material of every part of the locomotive," *Napier*, 272 U.S. at 611, and since those things "are in the hands of a manufacturer," Congress' intent to preempt that field "would be accomplished best by including the manufacturer within the statute's coverage." *Oglesby*, 180 F.3d at 462; *Law*, 114 F.3d at 911-12.

Nor does the "overall structure of the BIA" (Pet. 9), as interpreted by *Lorincie v. Southeastern Pennsylvania Transp. Auth.*, 34 F. Supp. 2d 929, 934 (E.D. Pa. 1998), further petitioner's argument that locomotive manufacturers fall outside the BIA's regulatory framework. This anomalous federal district court decision relied in substantial part on *Viad Corp. v. Superior Court*, 64 Cal. Rptr. 2d 136 (Ct. App. 1997), which was thereafter overruled by the California Supreme Court in *Scheiding*, and on *Oglesby v. Delaware & Hudson Ry. Co.*, 964 F. Supp. 57 (N.D.N.Y. 1997), which was thereafter reversed by the Second Circuit. *Lorincie* was expressly rejected by the Second Circuit in *Oglesby*, 180 F.3d at 462, and has not been favorably cited in any reported decision. Indeed, every reported case to consider *Lorincie* has rejected it. *Oglesby*, 180 F.3d at 462; *Roth*, 179 F. Supp. 2d at 1061; *Kilgore*, 853 So. 2d at 176.

V. The Ohio Supreme Court's Preemption Analysis Follows Established Precedent

In the face of the "avalanche" of precedent applying *Napier* to preclude petitioner's claims, the Ohio Supreme Court need not – as petitioner urges (Pet. 3) – have "examine[d] each of petitioner's common-law claims" in accordance with *Cipollone*, 505 U.S. 504, or "return[ed] to the language and legislative history of the BIA" pursuant to

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).[9] *Cipollone* and *Medtronic* do not in any way support petitioner's thesis; both cases involve express, not field, preemption and both hold that common-law tort claims are subject to preemption. *Cipollone*, 505 U.S. at 521-23 (common-law failure to warn claims alleging personal injury preempted); *Medtronic*, 518 U.S. at 502-03 (common-law duties preempted to same extent as statutes or regulations).

Petitioner's assertion (Pet. 3) that the Ohio Supreme Court should have examined the BIA's language and history to determine whether Congress specifically intended to

[9] Petitioner's suggestion (Pet. 3 n.3; 19 n.9) that the preemption issue is "unanswered" is flat wrong. This Court in *Napier* long ago answered the preemption issue presented here. Additionally, it has been firmly established by overwhelming case law following *Napier* that common-law tort claims against locomotive manufacturers are preempted by the BIA. *See supra* at 8-9. In any event, petitioner's theory (Pet. 3 n.3; 19 n.9) that this Court may not rely on "judge made common law" but must return to the federal statute itself to ascertain congressional intent is without any legitimate support and appears designed merely to obstruct informed decision-making. Indeed, in *English v. General Electric Co.*, 496 U.S. 72 (1990), the case cited by petitioner, this Court rejected petitioner's argument herein by noting that its decision was premised on prior "case[s] in which the Court has had occasion to consider the extent to which the Congress has pre-empted the field of nuclear safety." *Id.* at 80. Moreover, all that Tribe, *American Constitutional Law*, § 6-28, p. 1177 – cited by petitioner – meant in stating that "preemption analysis is . . . a matter of precise statutory construction rather than an exercise in free-form judicial policymaking" was that "courts in general, or the Supreme Court in particular," should not feel "liberate[d]," in determining the preemptive effect of federal statutes, "from a sense of fidelity to law, or from the judicial duty of interpreting what a given law means." *Id.* It cannot be doubted, as Tribe agrees, that attention to precedent is a part of that duty, particularly in "the context of statutory construction." *Id.* at § 3-3, p. 251.

preempt each of his common-law tort claims misunderstands field preemption. Field preemption "by definition means congressional intent generally extends beyond the express terms of the statute and regulations to all aspects coming within their contemplation." *Carrillo v. ACF Ind., Inc.*, 20 Cal. 4th 1158, 1168 (1999); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), citing *Napier*, 272 U.S. at 611 (Congress' intent to occupy a field exclusively may be inferred where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"). Congress' relevant "intent," therefore, in occupying the field is to "exclude state regulation" from the field. *English*, 496 U.S. at 79-80 n.5.

Hence, *Napier* did not inquire whether Congress had specifically considered curtains and fire doors; state law respecting them was preempted because the requirements were within the "broad scope of the authority conferred upon the Commission." 272 U.S. at 611. Likewise, *Law*, *First Security*, *Springston*, *Oglesby*, *Kilgore*, *Scheiding*, and *West Virginia Asbestos Litigation* found state law claims preempted regardless of whether Congress had considered the particular equipment or claims there at issue, or even tort claims generally. Indeed, *Scheiding* was exactly correct: "*Napier* has long established that Congress 'intended to occupy the field' of locomotive equipment," and to the extent plaintiffs desire to avoid application of that preemption to tort law, "they assume the burden of demonstrating a contrary congressional intent." 22 Cal. 4th at 481.

The Ohio Supreme Court correctly reiterated these principles – "The court [in *Napier*] recognized that Congress indeed had manifested the intention to 'occupy the entire field of regulating locomotive equipment' .. ." – and rightly

agreed with the West Virginia Supreme Court of Appeals that Congress' occupation of the field is so pervasive "as to justify a finding of preemption of that field." Pet. App. 15a (citation omitted).

Petitioner's next contention (Pet. 3), that the Ohio court "ignored the strong presumption against preemption," is untrue. There is no such presumption in areas historically regulated by the federal government, such as railroads. *United States v. Locke*, 529 U.S. 89, 108 (2000) (an "'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence"). Indeed, petitioner's own cases have no application to his proposition. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 665-70 (1993) (where federal law expressly provided for state jurisdiction, state law respecting local grade-crossing signals, a subject over which states "traditionally" exercise responsibility, was not preempted); *cf. Rice*, 331 U.S. at 230 (presumption against preemption applied because statute at issue, the Federal Warehouse Act, legislated in field traditionally occupied by the states). Here, there is no question that locomotive regulation involves "a history of significant federal presence." *Locke*, 529 U.S. at 108. Locomotive design, construction, and materials have been subject to exclusive federal regulation since *Napier* was decided three-quarters of a century ago. *Napier*, 272 U.S. at 611-13; *see also United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 687-88 (1982) ("Railroads have been subject to comprehensive federal regulation for nearly a century. . . . There is no comparable history of longstanding state regulation . . . of the railroad industry.").

Likewise, petitioner can find no solace in his argument (Pet. 3) that the presumption against preemption is especially

strong where the traditional police power of the states is concerned. *Napier* itself establishes that the BIA preempts health-and-safety laws with respect to locomotives and their parts. The states there defended their laws on the ground that they sought to "prevent sickness and disease." 272 U.S. at 612. Nonetheless, this Court held they were preempted "however commendable or however different their purpose." *Id.* at 611-13. In other words, because locomotive regulation is historically a federal field, no presumption against preemption exists merely because petitioner claims personal injuries. *Buckman*, 531 U.S. at 347-48 (no presumption against preemption of personal injury claim said to stem from fraud on federal agency; "Policing fraud against federal agencies is hardly a field which the States have traditionally occupied . . . such as to warrant a presumption against finding federal pre-emption of a state-law cause of action.") (citation omitted). Thus, as to locomotives, no presumption against preemption exists.

Finally, petitioner, citing to the dissent in the Ohio Supreme Court, argues (Pet. 4-5, 25) that inasmuch as asbestos is no longer in use, tort actions for injuries allegedly sustained by asbestos exposure would have no effect on the design, construction, or material of locomotives. This argument makes no sense. When locomotives were made, asbestos was lawful. No state could forbid the manufacturer from using asbestos or punish the manufacturer in tort for using it. Punishing the manufacturer decades after the fact for not discharging a duty it did not have decades before and could not discharge decades later would make the punishment illegal. *See Scheiding*, 22 Cal. 4th at 482 ("plaintiffs' lawsuits would have a retroactive regulatory effect by now allowing design control the BIA denied the

state at the time of manufacture").[10] The FRA intended no such thing; to the contrary, it has explicitly found regulation of asbestos unwarranted. *See* FRA Report to Congress, *Locomotive Crashworthiness and Cab Working Conditions* (1996).[11] Respondent's Appendix 2a, 7a, 13a.

VI. Recent Case Law – *Cipollone*, *Silkwood*, and *Sprietsma* – Does Not Change the Preemptive Scope of the BIA as Defined by *Napier* and Its Progeny

Petitioner (Pet. 16-19) relies on *Cipollone*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), to support his assertion that *Napier* is limited only to the preemption of state legislation regulating locomotives, not common-law tort remedies. These cases do not further petitioner's argument.

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[10] *See also Landgraf v. USI Film Products*, 511 U.S. 244, 265, 280 (1994) (because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," changes in federal law do not have retroactive effect "absent clear congressional intent favoring such a result"); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584 (1981) (because of "the danger of conflict" and the "usurpation of federal authority," plaintiffs' claims for higher payments barred even though rates in question no longer applicable and therefore any award could not threaten national uniformity).

[11] In particular: "While previous locomotive design incorporated the use of asbestos, and older locomotives remaining in service may still contain limited amounts of asbestos, there is no evidence that the presence of asbestos poses a problem to humans or the environment." Thus, "FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time," and "recommends no action be taken on the issue of asbestos in locomotives."

In *Cipollone*, this Court interpreted the term "regulation" in the context of, and as that term is used in, the statute's express preemption clause. 505 U.S. at 519. That interpretation, therefore, is not one of general application, especially so here, where there is no express preemption clause and no reference in the BIA to "regulation."[12] Moreover, *Cipollone* held that "common-law damage actions," being "premised on the existence of a legal duty," necessarily impose "requirements or prohibitions" and so are preempted. *Id.* at 521-23 (plurality opinion of four Justices), 548-49 (Scalia, J., agreeing on this point); *accord Napier*, 272 U.S. at 613 (*requirements* by the states as respect locomotive regulation are precluded).

Petitioner gets no further in arguing that common law is not preempted under *Silkwood*, 464 U.S. 238. In *Silkwood*, federal legislation made clear that "persons injured by nuclear accidents were free to utilize existing tort law remedies." *Id.* at 251-52. The legislative history showed that Congress assumed such remedies would be available and the "right of the State courts to establish the liability .. . in the normal way [was] maintained." Indeed, the "entire discussion surrounding" amendment to the Act "was premised on the assumption that state remedies were available." 464 U.S. at 251, 253-54. Thus, *Silkwood* was grounded in specific statutory evidence that Congress did not intend to preempt tort claims. There is no such evidence here.

Similarly, *Sprietsma* turns on specific statutory evidence that Congress intended to preserve tort claims. The statute there expressly *saved* "liability at common law" from

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[12] *See Locke*, 539 U.S. at 111, recognizing "the greater pre-emptive force" of field preemption.

preemption, and the only reference in the legislative history to field preemption predated the addition of the savings clause. 537 U.S. at 62-65, 69-70. Also, the statute's express preemption clause "d[id] not cover common-law claims," further evidencing Congress' intent not to preempt them in the first place. 537 U.S. at 62-63, 67-70. Indeed, the express preemption clause did not preempt anything at all absent a regulation on point, there was no such regulation, and the Coast Guard expressly stated that its decision not to regulate did not have any preemptive effect. 537 U.S. at 65-69. Obviously, Congress did not intend to preempt what it expressly saved, let alone on a subject that was not preempted at all. That has nothing to do with the BIA, which (1) preempts all state law in its field, (2) is part of a statutory scheme that creates an exclusive federal tort claim under FELA, and (3) contains no evidence that Congress intended to preserve state common-law tort claims.

VII. All State Law in the Field is Preempted; It Matters Not Whether There is a "Direct and Substantial" Effect on the Federal Scheme

Contrary to petitioner's contention (Pet. 19), *English*, 496 U.S. 72, does not require a "direct and substantial effect" on a federally regulated matter before state law is preempted. *English* holds that Congress' relevant "intent" in occupying the field is "to exclude state regulation" – all of it – from the field, so *any* state law in the field necessarily "conflicts with" Congress' intent. 496 U.S. at 79-80 n.5. In that case, the federal government preempted state law prompted by nuclear safety concerns but specifically saved state laws with "purposes other than protection against radiation hazards." 496 U.S. at 84 (quoting 42 U.S.C. § 2021(k) (1982)). This Court held a state law preempted if either (1) it had a safety

purpose or (2) although not motivated by safety concerns and so on its face preserved, it had a "direct and substantial effect" on safety decisions. 496 U.S. at 84-85. Thus, contrary to petitioner's argument, the "direct and substantial effect" language *preempted* state law otherwise preserved; it did not *save* state law otherwise preempted, as petitioner urges.[13]

Indeed, when *English* later focused on tort claims, it merely echoed *Silkwood*'s observation that Congress had expressly made clear that tort law was not within the field preempted by the Atomic Energy Act. 496 U.S. at 85-86. Here, Congress did no such thing. Thus, in the end, *English* and *Silkwood* are besides the point – as is *Medtronic*, 518 U.S. 470, which involves express preemption and turns on the scope of that statute's express preemption clause, not on a distinction between tort law and other laws. There, the majority of Justices held that tort claims are preempted like other state laws: "[I]nsofar as the [Medical Device Amendments] pre-empt[] a state requirement embodied in a state statute, rule, regulation, or other administrative action, [they] would also pre-empt a similar requirement taking the form of a standard of care or behavior imposed by a state tort action." 518 U.S. at 504-05 (Breyer, J., concurring);

[13] Petitioner additionally argues (Pet. 23) under *English* that preemption "does not arise unless a defendant is subjected to inconsistent duties, 'or where it is impossible to comply with both federal and state requirements.'" Petitioner has the standard wrong. *English* does not so state, and *Geier*, 529 U.S. 861, 868-69, explicitly rejects the notion. In any event, to the extent petitioner means to equate field with conflict preemption, he is at odds with two hundred years of Supreme Court law. Actually, his argument is circular, and so, as his own cases demonstrate, ends where it begins: Congress' relevant "intent" in occupying the field is "to exclude state regulation" from the field, so *any* state law in the field necessarily "conflicts with" that intent and is preempted. *English*, 496 U.S. at 79-80 n.5.

accord 518 U.S. at 510-11 (O'Connor, J., joined by Rehnquist, Scalia & Thomas, JJ., dissenting) (preemption clause "clearly pre-empts any state common-law action that would impose a requirement different from, or in addition to, that applicable under the FDCA – just as it would pre-empt a state statute or regulation that had that effect").

In any event, petitioner's claim would be preempted even under his own proposed test. "[S]tate-law claims would have a direct and substantial effect on the uniformity of locomotive design, construction, and material mandated by Congress through the BIA." *Scheiding*, 22 Cal. 4th at 481. If each state adopted different liability-triggering standards, locomotives would have to change equipment at the border or carry equipment required by the most stringent state's law, thus interfering with Congress' goal of uniform federal regulation. *Law*, 114 F.3d at 910-11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Locomotive Crashworthiness and Cab Working Conditions

Report to Congress

U.S. Department of Transportation

Federal Railroad Administration

Office of Safety Assurance and Compliance

September 1996

CHAPTER 10

Other Factors Affecting Locomotive Cab Working Conditions

FRA examined locomotive crew exposure to vibration and asbestos. Vibration can cause visual acuity problems and, when significant and/or combined with other factors, physiological effects. FRA conducted a review of open literature on the subject matter, and this chapter provides a summary of the findings.

FRA believes the best way to evaluate cab vibration is to conduct instrumented vibration measurements and studies, evaluate whether new cab designs successfully reduce vibration levels, and—if applicable—develop vibration guidelines.

Appendix

The two primary locomotive manufacturers stopped using asbestos in their locomotives in the 1970's, and FRA has not identified sources of friable asbestos to which crew members could be exposed. Based on this fact and the small number of earlier vintage locomotives still in use, asbestos is not considered an issue.

In addition to the working conditions addressed in previous chapters, FRA also evaluated two other factors that are not currently covered in FRA regulations, but which can affect the working conditions aboard locomotives—vibration and asbestos. This chapter discusses the source of vibration and asbestos in current locomotives, the health and safety effects associated with their presence, and recommended actions to minimize or eliminate these effects on the performance of the locomotive crew.

Vibration

Vibration—and its associated effects on health, proficiency, and comfort—is inescapable given current locomotive design. The Volpe National Transportation Systems Center (VNTSC) and FRA have identified three major sources of vibration in locomotive cabs[1]:

- reciprocating equipment (engines, compressors, alternators, superchargers and the like);

* * *

1. "Human Factors Guidelines for Evaluation of the Locomotive Cab," prepared by Jordan Multer, Robert Rudich, and Kevin Yearwood, U.S. Department of Transportation, Research and Special Programs Administration, John A. Volpe, Volpe National Transportation Systems Center, Cambridge, MA 02142.

- conduct vibration measurements and studies[10];
- determine whether vibration may physiologically and/or psychologically harm the locomotive crew over an extended period of time;
- evaluate whether new cab designs successfully address reduced vibration levels in locomotive cabs; and
- develop applicable vibration guidelines.

Asbestos

Review of Existing Asbestos Research and Literature[11]

Asbestos is a filamentous mineral useful because of its resistance to heat. Its primary use earlier in this century was as an insulating material, but in more recent years it has found widespread use in a number of other industries.

When asbestos is inhaled and deposited in the alveoli[12], it is ingested by macrophages[13], and via mechanisms that are not

10. Measurements of operational vibrations on all three axes, including those in the 1 to 10 Hz range, are needed to determine actual vibration conditions in the cab. Once these levels are known, the need and potential benefit of more extensive—and expensive—control can be determined.

11. Industrial Toxicology: Safety and Health Applications in the Workplace; Edited by Phillip L. Williams & James L. Burson, 1985.

12. Alveoli is an air sac of the lungs at the termination of a bronchiole.

13. Macrophage is a large phagocytic cell of the reticuloendothelial system.

currently clear, lead to the development of diffuse lung damage and the formation of fibrosis. Asbestos can lead to the development of a malignant tumor of the lining of the chest cavity and lung surface called mesothelioma, and, in association with cigarette smoking, can lead to an increased incidence of bronchogenic carcinoma.

The diagnosis of asbestosis depends upon a well-documented history of exposure, an accurate estimate of the degree of exposure, and a characteristic clinical picture. The patterns of impairment seen with asbestos exposure usually take 20 to 40 years to develop. There is evidence that lower exposure can lead to the development of mesothelioma. Individuals who develop moderate to severe degrees of asbestosis have a poor prognosis, and those who develop malignant mesothelioma have exceedingly poor outlook in that mesothelioma cannot be removed surgically, nor is it amenable to irradiation therapy or chemotherapy. The outlook for those individuals who develop associated bronchogenic carcinoma is the same for those who develop lung cancer and who have not been exposed to asbestos—that is, the 5-year survival rate is about 5 to 10 percent.

The long-term health consequences of this exposure are unknown. It is highly unlikely that this small degree of exposure could lead to the development of the interstitial fibrotic pattern of impairment, but there is a possibility that such exposure could lead to an increased incidence of mesothelioma and, in smokers, to an increased incidence of bronchogenic carcinoma.

Appendix

OSHA: Final Asbestos Rules[14]

In the August 10, 1994 *Federal Register*, OSHA published final regulations to protect workers from exposure to asbestos. The rules, which cover four million workers and are estimated to cost $361.2 million annually, went into effect on October 11, 1994. This OSHA rule applies to railroad operating employees.

At a press conference at OSHA headquarters, Assistant Secretary of Labor (OSHA), Joseph A. Dear said the rules will ensure effective long-term management of asbestos. OSHA has reduced the permissible exposure limit (PEL) from 0.2 fibers per cubic centimeter of air as an 8-hour time-weighted average to 0.1 fibers per cubic centimeter.

Asbestos in the Locomotive Cab

When steam generators were used on locomotives in passenger service, asbestos cement was used to insulate the heater coils to prevent loss of heat and contain the fire. Whenever the steam generator was disassembled and the coils had to be removed, the asbestos cement was broken up and removed, releasing asbestos particles which could be inhaled into the lungs. This source of asbestos was eliminated in the 1970's, when the head end power system was developed for the heating of passenger trains with electricity.

GE and EMD, the two primary manufacturers of current locomotives, made the following statements regarding asbestos in their locomotives:

14. Occupational Hazards, Sept. 1994, OSHA: Final Asbestos Rule Covers 4 Million Workers.

- GE[15] stated that asbestos has not been permitted in any facet of their locomotive production since October 1979. In addition, GE stated that there is no record of asbestos ever being used in the cab environment of its locomotives. Further, GE informed each of their outside suppliers in mid-1987 that all sub-assemblies provided for the production of locomotives must be free of asbestos.

- EMD[16] stated that of their 12 specification for sound and thermal insulation applications, only one contained asbestos as a filler with a resin bonded fiberglass and only fiberglass was used as a loose insulating material. An EMD service bulletin was issued on April 6, 1984, prohibiting the use of asbestos for any purpose in locomotive construction. This restriction also is applied to outside contractors supplying sub-assemblies for the production of locomotive construction depending upon the location. EMD had identified 60 pages of part numbers which contained asbestos in some form in previous locomotive construction; however, these parts have been discontinued.

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15. Mr. R. Shults, Manager-Product & Environment Impact, General Electric Company (GE).

16. Mr. Widdman, Electro Motive Division (EMD).

Appendix

Conclusions

FRA has reviewed literature outlining the known health and safety effects of asbestos exposure, and contacted representatives from both primary locomotive manufacturers regarding the present and past use of asbestos in the construction of locomotives. While previous locomotive design incorporated the use of asbestos, and older locomotives remaining in service may still contain limited amounts of asbestos, there is no evidence that the presence of asbestos poses a problem to human or the environment. The use of asbestos in locomotive production was terminated many years ago, and both primary manufacturers currently have policy statements prohibiting the use of asbestos in locomotive construction. Based on the above, FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time.

Appendix

CHAPTER 12

Findings and Implementation Strategy

FRA believes railroad safety will be best served by having regulatory action that is founded on consensus among those who are benefitted and/or burdened by the agency's regulation. The actions are divided into one of three categories for each key area:

- *initiate rulemaking to either adopt new standard or revise existing standard;*
- *work with industry to develop design/performance guidelines; or*
- *take no action.*

Broad Implementation Strategy

The Rail Safety Enforcement and Review Act mandated that FRA conduct a proceeding to determine the need for action on locomotive crashworthiness and working conditions. This mandate followed frequent expressions of concern by employee organizations and recommendations of the National Transportation Safety Board.

FRA has conducted a detailed research and analysis program as described in the preceding chapters, and conducted field examinations and inspection in an effort to determine the

benefits and, where available, the direct costs[1] of each crashworthiness feature or working condition improvement identified in the Act. Based on information obtained through these efforts, FRA identified the following general options for actions with respect to each individual area:

* * *

The ideas set forth in the Appendices are neither standards nor guidelines, but rather concepts intended to provide the basis for concrete and detailed discussion of options for overall improvements in locomotive cab safety.

Locomotive Cab Working Condition Improvement Implementation

Partnership Opportunities

FRA found that locomotive builders and operating railroads are taking steps to improve the working conditions in

1. This report does not include a detailed, economic cost-benefit analysis for each identified alternative. Such analysis necessarily includes a quantified evaluation of the predicted cost savings based on expected decreases in future losses when compared to a historical review of accidents involving locomotives not equipped with advanced crashworthiness protection systems. As such, this report does not present a thorough examination of the "total" costs associated with implementation of a particular crashworthiness feature. Rather, the costs presented indicate only the costs associated with the physical construction and/or implementation of that feature onto an existing locomotive, and should not be misconstrued to provide an evaluation of the economic feasibility of implementing the particular crashworthiness feature.

locomotive cabs. However, historically railroad operations have required train crews to work for long periods of time in an environment that would be expected to accelerate the onset of fatigue. The noise level in many locomotives is not conducive to effective communication and may contribute to long-term hearing loss of crew members, if exposure is sustained and repetitive and if personal protective equipment is not properly employed.

In hot weather, the temperature in a locomotive cab can reach levels that are recognized to cause rapid heat exhaustion and an accompanying drop in human performance. A combination of lack of cleaning and maintenance by railroads and/or abuse by crew members causes the sanitary facilities in many locomotives to be in deplorable condition. The industry needs to take additional action to improve these conditions.

The research and analysis done in response to the Act supports further work in concert with the industry parties to address temperature extremes in the locomotives cab and toilet areas. Literature on human performance suggests that more strictly controlling cab temperature would provide greater confidence in the capacity of crew members to perform their duties safely and efficiently. Remedial measures based on use of the "heat stress index," which includes the combined effects of high temperature and high humidity on human performance, could offer several potential health and safety benefits including:

- minimizing human errors due to heat stress;

- reduced cab noise, because windows can be closed during warm weather;

- improved cab air quality; and

- reduced risk of flying or thrown objects entering the cab through open windows.

Avoiding extremes of temperature will also aid in providing adequate, functioning sanitary facilities.

The results of FRA's survey of locomotive cab noise levels, when compared with existing governmental standards and literature on noise-induced hearing loss, suggest that noise levels during some locomotive assignments are sufficiently high to raise significant concerns. In the past few years, major railroads have instructed employees to wear personal hearing protection and have placed employees in hearing conservation programs. Newer locomotives have been designed to reduce noise exposure, but retirement of older locomotives will take many years; and many regional and short line railroads use older locomotives as the mainstay of their fleets.

FRA will work with the industry parties and others having expertise in this field toward more appropriate noise exposure standards that are centered on prevention of hearing loss. The current noise standards for locomotive cabs given in 49 CFR 229 have not kept pace with standards applicable to other workplaces, and opportunities for sharing information within the railroad industry regarding positive approaches to hearing conservation have not yet been exploited. A more active response by FRA to occupational noise exposure will be a major outcome of this study.

Appendix

Other issues that warrant concerted effort by FRA, employee organizations, manufacturers and suppliers, and the railroads include:

- cab sanitary facilities;
- cab ergonomics;
- cab seat design; and
- cab air quality.

Current regulations address these issues only with respect to basic cab seat safety and venting of exhaust gasses. Yet each falls clearly within the intent of the locomotive inspection statute to the extent it bears on the health and safety of crew members or the safe operation of the train.

Appendices K, L and M give respective examples of starting points for a cooperative effort with industry to develop approaches to each of these cab working condition improvements. FRA will work with our industry partners to develop appropriate approaches to these issues. FRA developed the cab sanitary facilities recommended practices given in Appendix K from the observations made by FRA inspectors during the cab working conditions survey done to support this report to Congress. The cab ergonomics guidelines given in Appendix L are based on a cab ergonomics study conducted by the Volpe National Transportation System Center, and discussions with Amtrak and the Burlington Northern Railroad. A concept for cab seat guidelines is given in Appendix M.

Appendix

No Action

FRA recommends no action be taken on the issue of asbestos in locomotives, except to the extent any new information requires that the issue be reopened. FRA found that friable asbestos has not been used as a material in the construction of locomotives for ten years or more. Locomotive builders are careful to avoid the use of asbestos in new and rebuilt locomotives. Asbestos remaining in older units is believed to be encapsulated in individual components or systems. FRA could find no evidence of asbestos being a health problem for crews of older locomotives.